United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

788

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,481

John B. Philson, Appellant

v.

United States of America, Appellee

On Appeal from the United States District Court for the
District of Columbia

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PETITION FOR REHEARING EN BANC

PETITION FOR REHEARING EN BANC

On May 8, 1968, a panel composed of Chief Judge Bazelon and Judges Bastian and Berger entered its opinion in the above-entitled matter, affirming a judgment of conviction for felony murder and attempted robbery in the District Court. The petitioner, by his attorney appointed by this Court, seeks a rehearing of that decision before the full Court en banc. Such a petition has already been filed in a companion case on behalf of Maurice Evans in No. 20,480 and we ask that they be considered jointly.

We urge that two issues be reheard. The first was the denial to the appellant of a speedy trial; fourteen months elapsed between his arrest and his trial, none of the delay attributable to appellant. The facts and arguments with reference to this issue are fully set forth in the brief already filed with this Court which we append hereto and incorporate herein. See pp. 7-14.

The second issue involves the prejudicial result of submitting to the jury a first degree murder count, unsupported by any evidence. The appellants were indicted for felony murder, first degree murder and attempted robbery. We argued (Brief, p. 14) that there was no evidence to support a verdict of first degree murder, and that the point had been appropriately made at the trial. We asserted that this was prejudicial even though the jury acquitted on this count because of the risk of

"horse-trading" by the jury to reach its verdict.

The panel appears to accept our argument that there was no evidence to support this count. The panel then made a serious error of fact in stating (Slip Opinion, p. 5) that "The court instructed the jury - more favorably than the law required - that it was to consider the felony murder charge first and if they found Appellants not guilty, not to reach the first degree murder charge but to acquit". The exact contrary is the case. The Court charged (Tr. p. 423) "..if you find the defendants are not guilty under the first count, that is, if you find the defendants not guilty of killing Edward Green or inflicting a wound on Edward Green from which he died while attempting to perpetrate a robbery, you will then have for your consideration the offense of first degree murder charged under the second count of the indictment".

The jury was therefore left with the clear - but erroneous - impression that the evidence warranted their returning a verdict of first degree murder. We say that the Second Circuit Court of Appeals has decided that this is prejudicial error. United States ex rel. Hentenyi v. Wilkins, 348 F. 2d 844 (2d Cir., 1965). The panel apparently was prepared to accept the authority of this case - it did not note any disagreement with it (See Slip Opinion, p. 4), but attempted to distinguish it on two grounds. Both are distinctions without a difference.

The first is to be found at footnote 3, page 4, of the opinion, that

Hentenyi involved unconstitutional submission of the first degree murder count (emphasis in original). But, as we pointed out in our original brief (page 20), Hentenyi arose on habeas corpus after a conviction in the New York State courts. The Second Circuit was not required to, and carefully refused to, decide that such erroneous submission reached a Constitutional dimension. This Court, unlike the Second Circuit in a habeas corpus proceeding, sits to insure the fairness of trials in the District, whether such unfairness is of Constitutional stature or not.

The second ground is that "...Hentenyi involved a lesser-included offense and the court there relied on the likelihood that the jury compromised to reach its verdict. The present case involves a felony murder charge, which is a separate charge, not a lesser-included offense" (Slip Opinion, p. 5). But why should that make a difference? Neither Hentenyi nor the State cases cited at footnote 4 of the Court's opinion made anything turn on this fact. The chances of a compromise verdict are precisely the same; indeed, it is arguable that at least some jurors would be more ready to compromise where there were separate offenses than where there was a lesser-included charge. In Hentenyi, the Court carefully analyzed the Supreme Court decisions holding that "The question is not whether the accused was actually prejudiced, but whether there is reasonable possibility that he was prejudiced." 348 F. 2d at page 864, emphasis in original. This possibility is in no respect diminished by

the fact that the erroneous count submitted to the jury was a separate offense rather than a lesser-included charge. As Mr. Justice Fortas pointed out in Cichos v. Indiana, 385 U.S. 76, 81 (1966), dissenting for himself and the Chief Justice and Mr. Justice Douglas (with no disagreement by the majority on this point) the situation here presented "...offered the jury a choice -- a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence", citing Hentenyi with approval.

We also rely on the unqualified language of Rule 29 of the Federal Rules of Criminal Procedure which calls for the entry of a judgment of acquittal on the unsupported count under these circumstances. See Brief, p. 14.

From this discussion, we believe that the seriousness of the error, of the panel in describing the District Court's instruction clearly appears. Had the jury been charged as stated, the danger of "horse trading" would have been appreciably diminished (though in our view not eliminated). But in fact the jury was charged in terms that if they acquitted of felony murder they should then go on to consider the charge of first degree murder. The very real possibility was thus raised that one or more jurors might have said "If you'll go along on finding them guilty of the felony murder charge, we'll find them innocent of

the first degree charge". This we assert to be prejudicial error.

The reasons for granting the petition, summarized, are:

1. We asserted in our brief that this was a problem of first impression in the Federal Courts, and this statement has not been challenged. The State Court decisions are in conflict (See Brief, P. 15, 16). The point should be decided.

2. The panel's decision is in conflict with the decision of the Second Circuit in Hentenyi. The conflict should be resolved.

3. The case raises an important procedural question, impinging on due process, in the administration of criminal justice in the District. In overseeing the administration of justice, the Court should set the matter at rest.

4. The panel decided the case on an erroneous version of the facts which led to an error of law.

Wherefore appellant prays that the full Court will rehear the case en banc.

Respectfully submitted,

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AFFIDAVIT AND CERTIFICATE OF SERVICE

I Hereby certify that the foregoing Petition for Rehearing En Banc is filed in good faith and not for purposes of delay and that a true and correct copy thereof has been deposited in the United States mail, postage prepaid, this 20th day of June, addressed to the following:

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Gerhard P. Van Arkel

BRIEF FOR APPELLANT

IN THE

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QUESTIONS PRESENTED

1. Was the appellant denied a speedy trial, where he was held in jail for fourteen months, with none of the delay attributable to him?

2. Was it prejudicial error for the Court to submit to the jury a count charging first degree murder when there was no evidence to support such a count, and where the jury acquitted on that count?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal in forma pauperis from a conviction in the District Court, entered on July 22, 1966, after trial before Walsh, J. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. sec. 1291.

STATEMENT OF THE CASE

The appellant was tried with the co-defendant below, Evans, on an indictment returned July 26, 1965, alleging as to each of them 1) felony murder, 2) first degree murder, and 3) attempted robbery, all committed on May 20, 1965.

The evidence at the trial produced only one eyewitness to the events giving rise to the indictment: one Alma Hackley. Her testimony was that five persons -- the appellants, the deceased, another woman and herself had had some drinks in a restaurant during the evening of May 19, and that at that time she saw the deceased, Green, with a gun (Tr. 57, 69); she was unable to say whether others present also saw the gun (Tr. 70). Before midnight they left the restaurant to go and purchase some liquor, and with the deceased, Green, driving, went to Elliott Street. There the three men got out of the car and crossed the street; when they reached the opposite curb, according to her testimony, the appellant Evans hit the decedent, Green, and the appellant Philson pinned him from the back. Then, "I seen a tussle and I heard a gunshot." (Tr. 79). After some hesitation, at a later point, she testified that the deceased had the gun in his hand when the shot was fired (Tr. 97). She testified that after the shot was fired the appellants "were going through his (Green's) pockets" (Tr. 59). About a week later, Green died of a gunshot wound.

Two other Government witnesses merely testified that they heard a shot fired (Brown, Tr. 136) or saw a scuffle (Holloway, Tr. 185). At the close of the Government's case, counsel for appellant moved to dismiss the count charging first degree murder (Tr. 216); the motion was denied. At the close of the case the motion to dismiss was renewed and again denied (Tr. 315).

On July 21, 1966, the jury retired to consider its verdict at 3:40 p.m. (Tr. 412). At 5:50 p.m. the jury requested that the charge with respect to felony murder be repeated. (Tr. 414). The jury was thereupon recessed, and the following morning the requested charge was repeated. The jury reached its verdict of not guilty of first degree murder, and guilty of felony murder and attempted robbery at about 11:07 a.m. (Tr. 424). The jury therefore had the case under consideration for about three and one-half hours. On August 26, appellant was sentenced for life on count one. Thereafter the present appeal in forma pauperis was allowed by the District Court.

The appellant here was arrested on May 22, 1965, and was not brought to trial until July 18, 1966, a delay of nearly fourteen months. We have not set forth the facts concerning this delay at this point, but shall incorporate them in our discussion on the merits.

CONSTITUTION AND RULES INVOLVED

Federal Rules of Criminal Procedure, Rule 50. Calendars.

"The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable."

Federal Rules of Criminal Procedure, Rule 48(b).

"If there is unnecessary delay ... in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

Federal Rules of Criminal Procedure, Rule 29(a).

"... The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed, if the evidence is insufficient to sustain a convinction of such offense or offenses...."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ...."

STATEMENT OF POINTS

1. The Court below erroneously refused to dismiss for want of a speedy trial.

2. The Court below committed prejudicial error in allowing

to go to the jury a count of first degree murder, unsupported by evidence, despite the appellant's later acquittal on that count.

SUMMARY OF ARGUMENT

I.

A. The appellant was denied his right to a speedy trial. He was held incarcerated for nearly fourteen months (a longer period than has been served by many who have been convicted of a felony), before his case was reached for trial. This "certainly is a long delay -- unusual for this District --" which "requires us to give close scrutiny to the other factors". Hedgepeth v. U. S., __U.S. App. D.C. __, 365 F. 2d 952, 954 (1966).

We show herein that none of this delay was attributable to the appellant, that he made appropriate complaint of the denial of his right to a speedy trial, and that the delay was solely for the convenience of the prosecution or the court. In the circumstances, it was prejudicial error for the court to deny motions to dismiss for want of a speedy trial.

B. The court erred in allowing the jury to consider a count charging first degree murder, and this error was prejudicial, even though the jury acquitted on that charge. There was a complete absence of any evidence showing malice or premeditation.

which might have sustained a verdict on that count. The natural tendency of juries to compromise verdicts in order to reach unanimity must mean that, instead of determining whether the appellant was guilty under those counts which might properly have been submitted; the jury, believing that it might reach a verdict on the more serious count, was diverted from properly considering the case before it. Our research leads us to believe that this is a question of first impression before the Federal courts, and we think it important in the administration of criminal justice in the District of Columbia. It seems clear that the court below committed error; the important problem is whether this error was prejudicial in view of the jury's verdict of acquittal on this count. Our principal reliance is on the decision of the Court of Appeals for the Second Circuit in the closely analogous case of U. S. v. Wilkins, 348 F. 2d 844 (C.A. 2, 1965), cert. den. 383 U.S. 913, and on a line of state court decisions holding this to be prejudicial error.

ARGUMENT

I. THE DEFENDANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL.

(Except to the extent that it may wish to check citations to the record herein, we do not think it necessary for the Court to read any part of the transcript with reference to this point.)

The law in this Circuit on this point is, we feel, well summarized in Hedgepeth v. U. S., U.S. App. D.C.__, 364 F. 2d 684, 687 (1966), pointing out that "There is no touchstone of time..."; that this "is but one factor, albeit the most important ...." and that among "the other factors to be considered are the reasons for the delay, the diligence vel non of prosecutor, court and defense counsel, and the likelihood, or at least reasonable possibility, that defendant has been prejudiced by the delay." We note also the observation in footnote 3 (id.) that "the very assumption of the Sixth Amendment is that unreasonable delays are by their nature prejudicial". With these factors in mind, we turn to consider the facts bearing on this issue.

The appellant was arrested on May 22, 1965, and held in jail. The jacket on his case shows that he was arraigned on July 30 and a plea of not guilty was entered; trial was set for October 25. On October 8 the co-appellant, Evans, moved for a mental examination which was granted on October 18, and the case was continued pending

a report. On January 6, 1966, after receipt of the report, the case was set for March 14, 1966.

On March 11, 1966, the jacket notes that case was continued to April 18, 1966, because "Mr. Caputy has other cases scheduled, and Mr. Caputy is ill". The last notation is very doubtful; the transcript of the proceedings before Judge Sirica on May 6, 1966, has the following colloquy (at page 7):

"THE COURT: I see a notation here ... Mr. Caputy has other cases scheduled for 3/14/66 and Mr. Caputy is ill.

MR. CAPUTY. No, I was not sick."

Clearly, then, this continuance was solely for the convenience of the Government.

The jacket shows that on April 12, 1966, there was another continuance to May 19, 1966, with the simple notation: "Too many cases." If anything remains of the asserted practice described by Judge Bazelon, dissenting in King v. U.S., 105 U.S. App. D.C. 193, 265 F. 2d 567 (1959), footnote 4 at page 572, that such a case "is carried from day to day till reached for trial or otherwise disposed of", it was not applied in this case. Clearly this delay was for the benefit of the Government.

On April 25, 1966, counsel for appellant filed a motion to dismiss for want of a speedy trial, which was argued May 6. By

this time appellant had spent nearly a year in jail, and it can hardly be urged that the motion was prematurely filed. At the argument, counsel for appellant stated (at page 3) "The last time ... that the Assignment Office called me, I refused to consent to a delay -- an additional delay of one month." The motion was denied.

On May 20, 1966, the case was continued to June 22, 1966, with the notation "Assignment Office"; there is no showing that the appellant consented to this further continuance. On June 22, the case was once more continued to July 18, 1966; the jacket suggests that this was at the request of counsel for the co-defendant who was going on vacation. The transcript of the proceedings of that day before Judge McGuire, page 2, to the contrary, shows that the defendants announced ready and that the postponement was due to the absence of witnesses for the Government.

At the outset of the trial, the motion to dismiss for want of a speedy trial was renewed (Tr. 3-8), and once again denied.

On this record, certain observations are to be made. We consider first the "diligence vel non of the prosecutor, court and defense counsel". There is no slightest showing that the prosecutor, or any court before which the question was raised, or the Assignment Office, made the slightest effort to secure a speedy trial. At no point was the case continued from day to day. There

is an affirmative showing that from April 25, 1966, on, counsel for the appellant diligently sought to bring the matter on.

As to the reasons for the delay, none was attributable to the appellant; to the contrary, after nearly a year in jail, he strenuously sought to avoid further delay. Some of the delay was due to the fact that the prosecuting officer "had other cases"; some to the fact that witnesses for the Government were not present; some to "too many cases"; and some, directed by the Assignment Office, remain completely unexplained. What emerges from this entire sequence of events is a totally callous disregard by the Government of the appellant's right to a speedy trial. The least that might have been anticipated is that, when his incarceration for nearly a year without trial was called to the attention of the Court, the case should have been continued from day to day. This Court has noted that a delay of this length is "unusual for this District". (Hedgepeth, supra) and there can be no question but that many defendants, arrested long after the appellant, were meantime being brought to trial. The salutary way for this Court to focus attention on these slovenly procedures in the District Court is to direct dismissal here for want of a speedy trial. See also Hanrahan v. U. S., 121 U.S. App. D.C. 134, 348 F. 2d 363 (1965) and cases therein cited.

It is true that the appellant did not move to advance the case for trial, a fact which we urge this Court to ignore. The difficulty with the procedures of the District Court is that the defendant is always promised a speedy trial which he does not then get. Each postponement in this case was for a period of about twenty or thirty days. A week or ten days is the minimum time within which counsel can prepare, file, docket and argue a motion to advance; the maximum relief which such a motion can provide is therefore an advance of at best a couple of weeks. Further, by filing such a motion, counsel runs the risk that it may be interpreted as a consent to the delays which have already taken place; and, if it is granted, that previous error is thereby cured. At the least, a motion to dismiss for want of a speedy trial ought to be treated as the equivalent of a motion to advance for trial; certainly it is an effective instrument for calling to the attention of the court the dissatisfaction of a prisoner, presumed innocent, who has spent nearly a year in jail, and it ought (at least where it is as meritorious as that herein) to trigger some response by the court and the prosecution to move the case forward.

The matter has been well stated by Judge Bazelon, dissenting in King v. U. S., 105 U.S. App. D.C. 193, 265 F. 2d 567 (1959) at 573:

> "There was no time, during the long delay, when the trial was not set on schedule. How could he have demanded

a speedy trial when he was constantly promised one? The date set for his trial was never as much as a month off. The defect was not that the court failed to grant appellant a speedy trial date, but that it granted him too many speedy trial dates and failed to keep them."

Insofar as a showing of prejudice is concerned, we assert that to be held incarcerated for fourteen months without trial is prejudice enough for anyone. We concur warmly in the observation in Hedgepeth, supra, that "unreasonable delays are by their nature prejudicial". The command of the Sixth Amendment is utterly explicit. Nothing is so characteristic of the totalitarian regime as "holding for trial"; lacking evidence sufficient to convict, the regime reaches its ambitions by merely confining its opponents. The guarantee of a speedy trial therefore serves an important social purpose; it is the mark of respect for the rights of the citizen; it alone is consistent with the presumption of innocence. Its enforcement ought not to depend on whether specific prejudice can be shown in the individual case.1/

1/ Cf. Glasser v. United States, 315 U.S. 60, 76 (1942) holding that the denial of the right to counsel is assumed to be prejudicial without indulging "in nice calculations as to the amount of prejudice arising from its denial".

If asked whether we can point to specific prejudice in this case, we must, in candor, admit that we cannot. We can do a great deal of speculating; for example, that had the appellant been brought to trial within a reasonable time, he might have had the benefit of the pre-Christmas leniency of juries, that Government witnesses might not have been available at an earlier time, and the like. But this is precisely the vice in any requirement that specific prejudice be shown; no one can know what the result would have been had the trial been earlier held, and such speculation is obviously futile. The Sixth Amendment does not say that "the accused shall enjoy the right to a speedy and public trial, if, having been denied it, he can show later on that it would have been in his interest". The guarantee is specific and unqualified. A contrary rule invites the kind of prejudicial speculation condemned in Jackson v. Denno, 378 U.S. 368, 380-382 (1964).

For these reasons, we say that the case should be remanded with directions to dismiss for want of a speedy trial. We are confident that such a result would do much to insure that the District Court, prosecuting officials, and the Assignment Office, will look with concern on the rights of defendants. We hazard the guess that the Government's answer will be tantamount to a statement that the system of criminal administration which has evolved in the lower

courts is so unwieldy and cumbersome that the Constitutional rights of defendants cannot be protected. We are confident that this Court does not share this defeatist view.

II. IT WAS PREJUDICIAL ERROR FOR THE DISTRICT COURT TO SUBMIT THE ISSUE OF FIRST DEGREE MURDER TO THE JURY.

(Except to the extent that the Court may wish to check the citations herein, we think it unnecessary for the Court to read any of the transcript.)

The facts in this case show that the shooting which resulted in the death of the deceased occurred in the course of a scuffle which, we must conclude from the jury's verdict, constituted an attempted robbery. There is a total absence of any evidence of premeditation or malice. Neither of the appellants was shown to be armed; the shooting took place with the deceased's gun, held in his own hand at the time, according to the only evidence on the matter. The facts are consistent only with an accidental and unpremeditated firing of the weapon during a scuffle. On these facts we assert that it was prejudicial error to allow the question of first degree murder to reach the jury.

The point was appropriately preserved. Appellant moved for a judgment of acquittal at the close of the Government's case and at the close of the case. Counsel for appellant stated, "....

Philson makes a motion that the matter be dismissed, the first degree be dismissed because there is no showing of the three essential elements of first degree murder." (Tr. p. 216). Under Rule 29 of the Federal Rules of Criminal Procedure, the Court was therefore directed that it "shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a convinction of such offense or offenses" (underlining supplied). The denial of that motion (Tr. 216) when first made, and when later renewed (Tr. 315) was therefore clear error. Thus far we believe the Government cannot disagree. The serious question presented is whether this error was prejudicial, in view of the acquittal by the jury on the first degree murder charge. So far as we can ascertain, this is a question of first impression in this and other Federal courts.

The better authority in the state courts, in our view, holds that such a submission to the jury is prejudicial. People v. Marshall, 366 Mich., 498, 115 NW 309 (1962); following People v. Stahl, 234 Mich. 569, 208 NW 685 (1926); Clark v. State, 131 Neb. 370, 268 NW 87 (1936); Gipe v. State, 165 Ind. 433, 75 NE 881

(1905); Tate v. People, 125 Colo. 527, 247 P 2d 665 (1952).[2/] This rests on the grounds that, "If the murder feature had been omitted from the instructions, ... it cannot now be said with certainty that the jury would have reached the same result" (Stahl, supra); that "Such instructions ... may have been an inducement to the jury to find the accused guilty on the least of the three charges, when, if that were the only charge submitted, they might have found him not guilty" (Clark, supra, at page 89); that "The instruction, in view of the evidence, was strongly calculated to be influential, because of its indication to the jury that there might be a conviction for the homicide..." (Gipe, supra, at page 439); that such instructions "present(s) a fertile field for discussion among jurors not skilled in legal techniques, for finding a welcome opportunity to compose differences and agree upon a compromise verdict" (Tate, supra). The cases holding to the contrary, for the most part, rest upon the unenlightening and conclusionary statement that in view of the acquittal of the more serious offense no prejudice is shown.

2/ But see Walker v. People, 126 Colo. 35, 248 P 2d 287 (1952), reaching the opposite result without citing Tate. There is contrary authority, represented by such cases as State v. English 233 Or. 500, 378 P 2d 997 (1963); Ruffin v. State, 50 Del. 83, 123 A 2d 461 (1956) and State v. Armstrong, 61 NM 258, 298 P 2d 941 (1956).

An examination of the state of Federal law indicates that what appears to be the majority and better reasoned line of state cases should be followed. Our principle reliance is on the closely analogous case of U. S. v. Wilkins, 348 F. 2d 844 (C.A. 2, 1965), cert. den. 383 U.S. 913. The facts there were that the appellant had been tried in the State of New York on an indictment charging first degree murder and was convicted of second degree murder, which under New York law is tantamount to an acquittal on the more serious charge. On appeal, this conviction was reversed. He was thereafter tried a second time for first degree murder, convicted; and on appeal the state courts again reversed. He was re-indicted a third time for first degree murder and found guilty of second degree; on appeal, the conviction was affirmed by the New York Court of Appeals. On an application for habeas corpus, denied by the federal District Court, the case reached the Court of Appeals for the Second Circuit.

The first question before the Court was whether the Double Jeopardy Clause of the United States Constitution applied to State action; the Court held that it did, at least on the facts before it. Having held that the appellant had been denied a Constitutional right by virtue of having been again tried for first degree murder, of which he had been once acquitted, the Court was faced with the

question whether this was prejudicial in light of his acquittal of first degree murder. It held that it was, and reversed.[3/]

Initially, the Court noted that the standard to be applied is "not whether the accused was actually prejudiced, but whether there is reasonable possibility that he was prejudiced" (at page 864, emphasis in original); the Court carefully enumerated the Supreme Court cases so holding, on which we rely. It went on to hold that the harmless error statute (29 U.S.C. sec. 2111) placed the duty of making this determination on the appellate rather than the trial court. After discussion it said that "we hold that there would be no rational basis for concluding that it is not reasonably possible that the accused was prejudiced by the unconstitutionally broad scope of the prosecution" (at page 865). It pointed out that "The mere fact that Hetenyi could have, logically and legally, been convicted of second degree murder on the basis of all the evidence, does not mean that he would have been so convicted if he were not also charged with first degree murder." (at page 866, emphasis in original)

3/ The Court, in footnote 27 at page 865, cites the decisions of State courts finding prejudicial error under the circumstances there presented. One of the contrary cases noted by the Court, Slaughter v. Tennessee, 25 Tenn. 410 (1846) was reversed in 1965 in King v. State, -- Tenn. --, 391 SW 2d 637.

We think some observations about this case are appropriate. While there was a dissent, it turned on grounds other than those which concern us. The opinion is lengthy, carefully considered, and well-reasoned. Whatever the import of a denial of the writ of certiorari, the Supreme Court has permitted it to stand. The case was subsequently cited with approval by Mr. Justice Fortas in Cichos v. Indiana, 385 U.S. 76 at 81, November 14, 1966, dissenting for himself and the Chief Justice and Mr. Justice Douglas, who noted, with no contradiction by the majority, that the situation presented "... offer(ed) the jury a choice -- a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence" (id.). We therefore state that the case is the strongest possible authority.

We see no question but that the case is a square holding that the submission of an unwarranted, more serious, charge to the jury is, as a matter of law, prejudicial. It is true that the opinion noted (at page 866) that "We are not suggesting that whenever the range of the prosecution is improperly broad or a greater charge is improperly submitted to the jury the trial is rendered constitutionally inadequate."; the Court throughout emphasized that it was the denial of a constitutional right that dictated the result.

We suggest that the reason for this caution is not far to seek. The case came up by way of habeas corpus. A holding that the unwarranted submission of a more serious charge is a Constitutional violation would have overthrown the law of those states which hold to the contrary. As the court stated (at page 866), "We have no occasion to consider that more far-reaching question..." and therefore carefully avoided doing so. Here no similar problem confronts this Court. It sits in a supervisory capacity over the administration of criminal justice in the District and is asked to lay down a rule of law for the Federal court in the District, not the States.

While we would argue that the procedure followed by the Court below amounted to a denial of due process, of Constitutional dimensions, we feel it unnecessary to reach that "far-reaching" question. That procedure resulted in prejudicial error, which this Court has power to correct, whether it reached the Constitutional level or not. This Court sits to ensure fair trials, irrespective of whether the error invades an appellant's Constitutional rights.

If this Court follows the persuasive precedent of Wilkins, then we submit that it should hold that, as a matter of law, the submission of the first degree murder count to the jury was prejudicial error, requiring reversal. If it will not go that far,

we then advance two alternative propositions. The first is that on the facts of this case the Government cannot establish that this procedure was not prejudicial. We cannot know what went on in the jury room, and the Government cannot show that at least one juror did not say, "I'll go along to find him innocent of first degree murder, if you'll go along and find him guilty of felony murder." A "reasonable possibility" therefore remains. The second is that prejudice is to be fairly inferred on this record. We have already shown that the Government's case was anything but overwhelming. The jury deliberated long hours, and requested a re-charge on the issue of felony murder. The available objective evidence would indicate that it was a difficult case. By allowing the first degree murder count to go to the jury, the Court, almost in express terms, told the jury that the evidence would warrant a conviction on that count and that they were free to so find if they chose. It is a human trait, not limited to jurors, to seek the middle way; to reach for that compromise by which alone a requisite unanimity may be reached. It must be obvious that the jury's consideration of the case would have taken place in an entirely different context had the first degree count been removed from their consideration. But we suggest that this Court ought to note the warning in Wilkins,

supra, at page 864, that such speculation as to what a jury might or might not have said in its deliberations can only have the result that, "The energies and resources consumed by such inquiry would be staggering and the attainable level of certainty most unsatisfactory. There could never be any certainty as to whether the jury was actually influenced by the unconstitutionally broad scope of the reprosecution .... even if there were a most sensitive examination of the entire trial record and a more suspect and controversial inquest of the jurors still alive and available". Nothing in these remarks turn, we suggest, on the fact that a Constitutional, as distinguished from a fair trial, issue was presented.

CONCLUSION

We ask that matters covered in the brief of co-appellant Evans, applicable here, be treated as part of this brief.

We therefore urge that this Court hold a) that appellant was denied a speedy trial, and enter a judgment of dismissal or b) that prejudicial error was committed in allowing the first degree murder charge to go to the jury and grant a new trial.

Respectfully submitted,

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